INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
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CASE MIS No.: TAM-120768-01/CC:PSI:B9

Chief, Appeals Office

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No:
Year Involved:
Date of Conference:

LEGEND:

Spouse	=
Decedent	=
Marital Trust	=
Date 1	=
Date 2	=
Son	=
Revocable Trust	=
Date 3	=
Court 1	=
Date 4	=
$x	=
$y	=
Date 5	=

Court 2	=
Court 3	=
Date 6	=
Date 7	=

ISSUE:

Whether Spouse's will grants Decedent an inter vivos general power of appointment over the Marital Trust such that the Marital Trust is includible in Decedent's gross estate under I.R.C. § 2041(a).

CONCLUSION:

Spouse's will gave Decedent a general power of appointment over the Marital Trust. Therefore, the Marital Trust is includible in Decedent's gross estate under § 2041.

FACTS:

Item II of Spouse's will creates a Marital Trust and provides, in part:

> If my wife, [Decedent], shall survive me, I give, devise and bequeath to my Trustees, hereinafter named, in trust and confidence, nevertheless, for the uses and purposes hereinafter set forth, an amount equal to one-half (½) of the value of my adjusted gross estate as finally determined for federal estate tax purposes, less an amount equal to the value of all property which passes or has passed to my said wife either under other provisions of this Will, or outside of this Will and which qualifies for the marital deduction allowable for federal estate tax purposes; provided, however, no assets shall be made a part of this trust estate which do not qualify for said marital deduction. This trust estate shall be administered by my Trustees as a separate trust.

Item XIV of Spouse's will provides as follows:

> Anything in this Will to the contrary notwithstanding and whether or not any reference is made in any other provision of this Will to the limitations imposed by this Section XIV, my Trustee shall not have or exercise any authority, power or discretion over the Marital Trust or the income thereof, or the property constituting the same, nor shall any payment or distribution by my Trustee be limited or restricted by any provision of this Will, which

> would in any way (a) adversely affect the qualification of the Marital Trust, (b) prevent my estate from receiving the benefit of the maximum marital deduction, or (c) affect the right of my said wife to all income therefrom or her right to dispose of the principal and income thereof in the amount and to the extent necessary to qualify the Marital Trust for the marital deduction for Federal estate tax purposes under the provisions of the law applicable to my estate.

Spouse died on Date 1, survived by Decedent and their three children. The personal representative of Spouse's estate claimed a marital deduction, under § 2056(b)(5) of the Internal Revenue Code of 1954, on Spouse's federal estate tax return. On audit, the Service did not disallow the deduction.

Decedent died on Date 2. Decedent's will bequeathed the residue of her estate, "including all assets which are subject to my power of appointment pursuant to the Marital Trust created under Item Two of the Last Will and Testament of my late husband" to Son, as trustee of Decedent's Revocable Trust. The effect of Decedent's will and Revocable Trust was to disinherit Decedent's two daughters, leaving the majority of her estate to Son and three charities.

After Decedent's death, Decedent's three children disputed ownership of the Marital Trust assets. Decedent's two daughters contended that Decedent did not possess a power of appointment over the Marital Trust; therefore, the Marital Trust assets should revert to Spouse's estate to be distributed one-third to each of the three children, pursuant to the residuary clause in Spouse's will. Decedent's son, as personal representative of Decedent's estate and trustee of Decedent's Revocable Trust, contended that Decedent possessed and exercised a general power of appointment over the Marital Trust assets and, therefore, the Marital Trust assets should be distributed to the various charitable organizations and other beneficiaries named in Decedent's Revocable Trust. On Date 3, the trustee of the Marital Trust filed a Complaint for Declaratory Judgment in Court 1 asking the court to determine whether Spouse's will gave Decedent the power to appoint the Marital Trust assets inter vivos and/or in her will.

On Date 4, Son, in his capacity as personal representative and trustee, filed a request for an extension of time to file Decedent's estate tax return and remitted an estimated tax payment of $x, which included $y in tax due to the inclusion of the Marital Trust assets in Decedent's gross estate.

On Date 5, Court 1 issued a ruling and found that as a matter of law, when Spouse's will is "read in its entirety, Item XIV grants [Decedent] power over the Marital Trust. However, this power is limited to inter vivos because ambiguous granting language must be construed only as broadly as is necessary to fulfill the testator's intent. See Hutchinson v. Farmer, 190 Md. 411 (1948). Furthermore, the fact that the IRS

approved the marital deduction did not establish that [Decedent's] powers were greater than inter vivos because the Trust would have qualified for the deduction if [Decedent] had either inter vivos or testamentary power." The court concluded that the Marital Trust assets revert to Spouse's estate to be distributed according to the residuary clause in his Will. On appeal, Court 2 affirmed the lower court ruling, concluding: (i) that Spouse's will does not clearly demonstrate that Spouse intended to grant Decedent a testamentary power of appointment over the assets of the Marital Trust; and (ii) under prevailing case law, the language in Spouse's will is insufficient to grant Decedent such a power. Court 3 declined to review the case.

In Date 6, while the state court litigation was still pending, Son filed Decedent's federal estate tax return and included the assets of the Marital Trust in Decedent's gross estate.

In Date 7, Decedent's estate filed a claim for refund of $y in estate taxes paid, claiming that based on the state court rulings, the Marital Trust was erroneously included in Decedent's gross estate.

LAW AND ANALYSIS:

Section 2001 provides that a tax is imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that for purposes of the tax imposed by § 2001, the value of the taxable estate shall, except as limited by § 2056(b), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Section 2056(b)(1) provides the general rule that where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest – (A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and (B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse.

Section 2056(b)(5) provides that in the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or

such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse – (A) the interest or such portion thereof so passing shall, for purposes of § 2056(a), be considered as passing to the surviving spouse, and (B) no part of the interest so passing shall, for purposes of § 2056(b)(1)(A), be considered as passing to any person other than the surviving spouse. This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

Section 20.2056(b)-5(a) of the Estate Tax Regulations provides that the interest in property which passes from the decedent to his surviving spouse is a deductible interest under § 2056(b)(5) to the extent it satisfies the following conditions: (1) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest. (2) The income payable to the surviving spouse must be payable annually or at more frequent intervals. (3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate. (4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events. (5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse.

Section 20.2056(b)-5(e) provides, in part, that in determining whether or not the conditions set forth in § 20.2056(b)-5(a)(1) through (5) are satisfied by the instrument of transfer, regard is to be had to the applicable provisions of the law of the jurisdiction under which the interest passes and, if the transfer is in trust, the applicable provisions of the law governing the administration of the trust.

Section 2041(a)(2) provides, generally, that the value of the gross estate includes the value of all property to the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive.

Section 2041(b)(1) provides that the term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.

Section 20.2041-1(b) provides, in part, that the term "power of appointment" includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations.

In this case, Decedent's estate contends that a refund of the estate taxes paid with respect to the Marital Trust should be granted, based on the state court rulings which determined that Decedent did not have a testamentary power of appointment and that the assets of the Marital Trust reverted to Spouse's estate on Decedent's death.

Where, as in the present case, the federal estate tax liability turns upon the character of a property interest held, we are required to look to state law to determine the nature of the interest. Morgan v. Commissioner, 309 U.S. 78 (1940). In the present matter, since Spouse was a resident of Maryland, we look to Maryland law. In the absence of a determination by the state's highest court, we must apply what we find the state law to be, after giving "proper regard" to decisions of lower state courts. Estate of Bosch v. United States, 387 U.S. 456, 465 (1967).

It has long been the rule in Maryland that, unlike most jurisdictions, a power to appoint or dispose of property by will is not a general power of appointment unless the instrument expressly authorizes the holder of the power to appoint to himself, to his own estate or to his creditors. See Bryan v. United States, 286 Md. 176 (1979) (holding no general power of appointment existed where will provided that "[t]he Trustee shall pay over the net income collected by it from the First Fund, in quarterly installments or oftener in its discretion, to my wife, W during her life; and at her death it shall dispose of the corpus thereof (including any accrued income) as she may direct by her will pursuant to a general power of testamentary disposition with respect to the First Fund which is hereby granted to her"); Frank v. Frank, 253 Md. 413, 415 (1969) (holding no general power of appointment existed where will provided, "I hereby confer upon my said wife full and complete testamentary power of disposition over fifty per cent (50%) of the rest, residue and remainder of my estate [which had been left in trust for W for life], free and clear of all trusts"). See also Rev. Rul. 76-502, 1976-2 C.B. 273 (holding no general power of appointment exists under Maryland law where trust provides "[u]pon the death of my spouse, B, the corpus of the trust estate shall be paid over in such portions as my spouse, B, may by Last Will and Testament designate and appoint. In the event my spouse, B, fails to exercise effectively such power of appointment, then the corpus shall be paid over to my children, C and D, share and share alike").

In the present case, the state courts only determined whether Spouse's will gave Decedent an inter vivos or testamentary power of appointment over the Marital Trust. The courts held that Decedent had an inter vivos power of appointment, but did not determine the extent of Decedent's inter vivos power. Accordingly, the state case law

construing testamentary general powers of appointment is not dispositive of whether Spouse's will granted Decedent an inter vivos general power of appointment. There is no judicial precedent in State directly on point.

Item XIV of Spouse's will provides that the Trustee "shall not have or exercise any authority, power or discretion over the Marital Trust or the income thereof . . . nor shall any payment or distribution by my Trustee be limited or restricted by any provision of this Will, which would in any way (a) adversely affect the qualification of the Marital Trust, (b) prevent my estate from receiving the benefit of the maximum marital deduction, or (c) affect the right of my said wife to all income therefrom or her right to dispose of the principal and income thereof in the amount and to the extent necessary to qualify the Marital Trust for the marital deduction for federal estate tax purposes." In order for the Marital Trust to qualify for the marital deduction for federal estate tax purposes, the governing provisions of the Marital Trust would have had to satisfy the requirements of § 2056(b)(5). In order to satisfy the requirements of § 2056(b)(5), Spouse would have had to give Decedent, among other things, the power to appoint the Marital Trust assets to herself and/or to her estate. Whether exercisable by will or during life, the power would have had to be exercisable by Decedent alone and in all events. In addition, there could not have been any other person, aside from Decedent, who had the power to appoint any part of the Marital Trust to any person other than Decedent.

It can be inferred from the language in Item XIV, that by precluding the trustee from taking any action that would adversely affect Decedent's right to all the income or her right to dispose of the principal and income in the amount and to the extent necessary to qualify the Marital Trust for the marital deduction, that Spouse intended Decedent to have the right to dispose of the trust principal and income in favor of herself. Therefore, under the facts presented, we conclude that Spouse's will provided Decedent with an inter vivos general power of appointment under § 2041(b). Even though Decedent's general power could be exercised only during her life, and not by will, Decedent is treated as having the power at her death. See Snyder v. United States, 203 F. Supp. 195 (W.D. Ky. 1962); Jenkins v. United States, 428 F.2d 538 (5th Cir. 1970). Accordingly, the Marital Trust is includible in Decedent's gross estate under § 2041(a).

In addition, we believe that the doctrine of duty of consistency is applicable to the facts of this case. The equitable doctrine of duty of consistency is:

> based on the theory that a taxpayer owes the Commissioner the duty to be consistent with his tax treatment of the same or related items and will not be permitted to benefit in a later year from an error or omission made in a prior year which cannot be corrected because the statute of limitations has expired.

Erickson v. Commissioner, T.C. Memo. 1991-97, citing Southern Pacific Transportation Co. v. Commissioner, 75 T.C. 497, 838-39 (1980).

The doctrine requires the presence of three elements: (1) a representation by the taxpayer; (2) reliance on the representation by the Service; and (3) an attempt by the taxpayer, after the statute has run, to change the representation.

This doctrine is generally applied in cases where the same taxpayer takes inconsistent positions with respect to separate taxable years. In addition, courts have applied the doctrine where two taxpayers are in a "privity-type" relationship. See, e.g., Hess v. United States, 537 F.2d 457, 464 (Ct. Cl. 1976); cf. Cluck v. Commissioner, 105 T.C. 324 (1995). In Estate of Letts v. Commissioner, 109 T.C. 290 (1997), the court said:

> A husband and wife can have interests so closely aligned that one may be estopped under the duty of consistency by a prior representation of the other. Cluck v. Commissioner, [105 T.C. at 331-37.] The same can be true of the estates of a husband and a wife. Whether there is sufficient identity of interests between the parties to apply the duty of consistency depends on the facts and circumstances of each case. Id. at 335.

The Commissioner's position is that there is privity between the estate of a deceased spouse and the estate of the surviving spouse. The decedent's estate and the spouse's estate are closely related because one derives a benefit from the marital deduction of the other. Cf. Estate of Shelfer v. Commissioner, 103 T.C. 10, 19 (1994) (Parr, J., dissenting), rev'd on other grounds, 86 F.3d 1045 (11th Cir. 1996). Moreover, we believe the facts here demonstrate privity between Decedent's estate and Spouse's estate. Decedent was named co-executor and trustee of the Marital Trust by Spouse's will. Moreover, Decedent received the income from the Marital Trust, the value of which had not been decreased by estate taxes because of the marital deduction allowed to Spouse's estate. In LeFever v. Commissioner, 100 F.3d 778 (10th Cir. 1996), the court found privity between the taxpayer and the decedent where the taxpayer was the executor of the decedent's estate. Accordingly, we conclude that Decedent's estate and Spouse's estate are in privity.

Since there is a strong case for privity of the two estates, the duty of consistency should apply. Here, all three criteria of the duty of consistency are met. A representation was made by Spouse's estate that taxation of the funds in the Marital Trust would be deferred from his estate and would be included in Decedent's estate. That representation was reinforced by the return filed by Decedent's estate, which included the Marital Trust in her estate. The Service relied on that representation during the audit of Spouse's estate. That reliance was to the Service's detriment, however, since the period of limitations under which the Service might have been able to retrieve the proper tax owed by Spouse's estate has expired. Finally, at present, Decedent's estate is attempting to retrieve the tax it paid on the amounts, asserting that the amounts

should have been taxed as assets of Spouse's estate. Accordingly, we believe all three elements of the duty of consistency are satisfied.

CAVEAT

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.